

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

WILLIAM C. SHAW,

Plaintiff,

vs.

ED HAY, LINCOLN HATHAWAY,
SCOTT MASON, BILL NORTON,
and ROBERT COSSEY,

Defendants.

No. CV-11-021-LRS

ORDER OF DISMISSAL

The *pro se* Plaintiff has been allowed to file his Complaint *in forma pauperis* subject to review by the undersigned for legal sufficiency. (Ct. Rec. 3).

Plaintiff's 42 U.S.C. Section 1983 Complaint alleges he was deprived of his federal constitutional rights in connection with certain criminal proceedings against him in the Spokane County Superior Court.

PROSECUTORIAL IMMUNITY

Defendant Ed Hay is a deputy prosecuting attorney with Spokane County.

"[A] state prosecuting attorney who act[s] within the scope of his duties in initiating and pursuing a criminal prosecution" is not amenable to suit under Section 1983. *Imbler v. Pachtman*, 424 U.S. 409, 410, 96 S.Ct. 984 (1976).

"[A]cts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial which occur in the court of his role as an advocate for the

State, are entitled to the protections of absolute immunity.” *Buckley v. Fitzsimmons*, 509 U.S. 259, 273, 113 S.Ct. 2606 (1993). Plaintiff’s Complaint alleges Hay filed an amended information against the Plaintiff “knowing it lacked any factual basis.” The filing of an information falls within the scope of a prosecutor’s duties in initiating and pursuing a criminal prosecution. Deciding whether to prosecute is an activity protected by absolute prosecutorial immunity. Plaintiff alleges that Hay subsequently made false allegations to the superior court in connection with appear to have been probation revocation proceedings. Making statements that are alleged misrepresentations and mischaracterizations during hearings, during discovery, and in court papers are considered activities intimately connected with the judicial phase of the criminal process and therefore, protected by absolute prosecutorial immunity. *Fry v. Melaragno*, 939 F.2d 832, 837-38 (9th Cir. 1991).

PROBATION OFFICER IMMUNITY

Plaintiff alleges Spokane County probation officer Lincoln Hathaway presented false information to the court which resulted in Plaintiff being jailed.

In gathering information relevant to Plaintiff’s probation and presenting it to the court, Hathaway was discharging duties to the court placed upon him by Washington law and acting as “an arm of the sentencing judge.” Therefore, he is entitled to absolute quasi-judicial immunity which extends to individuals “whose functions bear a close association to the judicial process.” *Demoran v. Witt*, 781 F.2d 155, 157 (9th Cir. 1985). The purpose of this immunity is to assure that probation officers “can perform their respective functions without harassment or intimidation.” *Butz v. Economu*, 438 U.S. 478, 512, 98 S.Ct. 2894 (1978).

PUBLIC DEFENDERS

Plaintiff alleges his public defenders in probation proceedings, Bill Norton

1 and Scott Mason, rendered constitutionally ineffective assistance by not contesting
2 the allegations against him regarding violations of his probation.

3 These defendants are not subject to liability under Section 1983 because
4 they are not state actors. A public defender “does not act under color of state law
5 when performing a lawyer’s traditional functions as counsel to a defendant in a
6 criminal proceeding.” *Polk Co. v. Dodson*, 454 U.S. 312, 325, 102 S.Ct. 445
7 (1981) (a public defender performing a lawyer’s traditional functions as counsel to
8 a defendant, such as determining trial strategy and whether to plead guilty, is not
9 acting under color of state law). A public defender “works under canons of
10 professional responsibility that mandate his [or her] exercise of independent
11 judgment on behalf of the client” and the Constitution requires that the state
12 “respect the professional independence of the public defenders whom it engages.”
13 *Id.* at 321-22. Thus, although a public defender may be paid by the state, when
14 advocating on behalf of his or her client, a public defender’s responsibilities entail
15 “functions and obligations in no way dependant on state authority.” *Id.* at 318.

16 17 **CONSPIRACY**

18 It appears Defendant Robert Cossey may have been defense counsel
19 privately retained by Plaintiff. Plaintiff alleges Cossey conspired with Hay to
20 induce Plaintiff to enter an involuntary guilty plea and that this was accomplished
21 by Cossey falsely promising a guilty plea would not effect the outcome of a
22 petition the Plaintiff had pending before the Washington Court of Appeals.
23 Plaintiff alleges the petition ended up being dismissed as moot, as “preplanned” by
24 Hay and Cossey.

25 A defense attorney who conspires with state officials to deprive a client of
26 his federal rights acts under color of state law and may be liable under Section
27 1983. *Tower v. Glover*, 467 U.S. 914, 923, 104 S.Ct. 2820 (1984). To prove a
28 conspiracy between the state and private individuals under Section 1983, the

1 Plaintiff must show an agreement or meeting of the minds to violate constitutional
2 rights. *Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir. 2002). Conclusory allegations
3 are insufficient to state a claim of conspiracy to violate a plaintiff's federal rights.
4 *Ashcroft v. Iqbal*, U.S. , 129 S.Ct. 1937, 1949-50 (2009). "A pleading that
5 offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause
6 of action will not do.'" *Id.* at 1949, quoting *Bell Atlantic Corp. v. Twombly*, 550
7 U.S. 544, 555, 127 S.Ct. 1955 (2007). Moreover, to avoid dismissal, a complaint
8 must state a conspiracy claim that is "plausible on its face," meaning that the
9 factual content alleged "allows the court to draw the reasonable inference that
10 defendant is liable for the misconduct alleged." *Id.* "Where the well-pleaded facts
11 do not permit the court to infer more than the mere possibility of misconduct, the
12 complaint has not shown that the pleader is entitled to relief." *Id.*, citing Fed. R.
13 Civ. P. 8(a)(2).

14 Here, the Plaintiff's allegations regarding an alleged conspiracy between
15 Hay and Cossey are wholly conclusory. The conspiracy claim pled by the Plaintiff
16 is not plausible on its face. The facts pled by the Plaintiff in support of that claim
17 do not permit the court to infer more than the mere possibility of misconduct. To
18 the extent Plaintiff alleges his public defender, Bill Norton, conspired with Hay
19 and Hathaway to have Plaintiff's probation revoked in violation of his
20 constitutional rights, that allegation too is wholly conclusory and is not plausible
21 on its face.

22 23 **CONCLUSION**

24 Plaintiff's Complaint fails to state a claim on which relief may be granted
25 and otherwise seeks monetary relief against defendants who are immune from
26 such relief. Accordingly, this action is *sua sponte* **DISMISSED** with prejudice
27 pursuant to 28 U.S.C. Section 1915e(2)(B)(ii) and (iii). Plaintiff may appeal this
28 order to the Ninth Circuit Court of Appeals, although this court hereby certifies

1 that any appeal taken from this “Order of Dismissal” is not taken in good faith. 28
2 U.S.C. Section 1915(a)(3).

3 **IT IS SO ORDERED.** The District Executive shall enter judgment
4 accordingly and forward copies of the judgment and this order to Plaintiff.

5 **DATED** this 11th of April, 2011.

6 *s/Lonny R. Suko*

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8 LONNY R. SUKO
United States District Judge